

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 07-0310
Sales and Use Tax
For The Tax Years 2004-2006**

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ISSUES

I. Sales and Use Tax - Imposition.

Authority: IC 6-8.1-5-1(c); IC § 6-2.5-2-1(a); IC § 6-2.5-3-2(a); IC § 6-2.5-5-8(b);
IC § 6-2.5-6-14.1; 45 IAC 2.2-5-15.

The Taxpayer protests the imposition of use tax.

II. Tax Administration - Ten Percent Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; 45 IAC 15-11-2(b)(c).

The Taxpayer protests the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

The Taxpayer is a corporation engaged in environmental, health, and safety compliance consulting. The Indiana Department of Revenue (Department) audited the Taxpayer for the tax years 2004-2006. The audit resulted in an assessment of additional use tax, interest, and penalty. The Taxpayer protested the assessment of use tax on consumable supplies, testing supplies, and penalty. Alternatively, the Taxpayer requested a credit equal to the amount of sales tax collected and remitted on the consumable supplies. A hearing was held and this Letter of Findings results.

I. Sales and Use Tax - Imposition.

DISCUSSION

The Taxpayer purchased supplies such as disposable bailers, latex gloves, marking paints, and PH buffer packs to use while testing soil without paying sales tax at the time of purchase. The Department assessed use tax on these supplies because the Taxpayer used them in the provision of soil testing services. The Taxpayer protested this assessment. The Taxpayer argued that its purchase of the supplies was exempt from sales tax because the supplies were resold to the Taxpayer's customers. Alternatively, the Taxpayer requested a credit against its use tax liability in the amount of the sales tax it collected and remitted on the supplies.

All tax assessments are presumed to be valid. IC § 6-8.1-5-1(b). The Taxpayer bears the burden of proving that any assessment is incorrect. *Id*

IC § 6-2.5-2-1(a) imposes sales tax on retail transactions made in Indiana. IC § 6-2.5-3-2(a) imposes a complementary use tax on the storage, use or consumption of tangible personal property in Indiana, if the property was acquired in a retail transaction as defined for sales tax purposes and sales tax was not paid at the time of purchase. IC § 6-2.5-5-8(b) provides for an exemption from the sales tax for tangible personal property purchased to be resold in the Taxpayer's ordinary course of business.

45 IAC 2.2-5-15 clarifies the purchase for resale exemption as follows:

- (a) The state gross retail tax shall not apply to sales of any tangible personal property to a purchaser who purchases the same for the purpose of reselling, renting or leasing, in the regular course of the purchaser's business, such tangible personal property in the form in which it is sold to such purchaser.
- (b) General rule. Sales of tangible personal property for resale, rental or leasing are exempt from the tax if all of the following conditions are satisfied:
 - (1) the tangible personal property is sold to a purchaser who purchases this property to resell, rent or lease it;
 - (2) *The purchaser is occupationally engaged in reselling, renting or leasing such property in the regular course of his business; and*
 - (3) The property is resold, rented or leased in the same form in which it was purchased.
- (c) Application of General rule.
 - (1) The tangible personal property must be sold to a purchaser who makes the purchase with the intention of reselling, renting or leasing the property. *This exemption does not apply to purchasers who intend to consume or use the property or add value to the property through the rendering of services or performance of work with respect to the property.*
 - (2) The purchaser must be occupationally engaged in reselling, renting or leasing such property in the regular course of his business. *Occasional sales and sales by servicemen in the course of rendering services shall be conclusive evidence that the purchaser is not occupationally engaged in reselling the purchased property in the regular course of his business.*

(3)The property must be resold, rented or leased in the same form in which it was purchased. (Emphasis added.)

The Taxpayer's primary occupation was consulting and the provision of studies on environmental, health, and safety issues. Often the Taxpayer needed to test soils to prepare its reports. The Taxpayer used the disposable supplies as tools in the provision of services – the testing of soils for information to be used in its consulting business. The Taxpayer was not in the business of buying and reselling disposable bailers, latex gloves, marking paints, and PH buffer packs. Since the Taxpayer was not regularly engaged in the purchase and resale of tangible personal property and the consumable supplies were used in the performance of the Taxpayer's service, the consumable supplies did not qualify for exemption from the sales tax pursuant to IC § 6-2.5-5-8(b).

Alternatively, the Taxpayer requested a credit against its use tax liability for the sales taxes it incorrectly collected and remitted to the state. In order to credit the sales taxes to the Taxpayer's use tax liability, the Department would have to first refund the sales taxes to the Taxpayer and then apply the refunded taxes to the current use tax liability.

The law concerning the refund of sales taxes to a merchant is found at IC § 6-2.5-6-14.1 as follows:

Notwithstanding the refund provisions of this article as incorporated from the gross income tax law (IC 6-2.1, repealed), a retail merchant is not entitled to a refund of state gross retail or use taxes unless the retail merchant refunds those taxes to the person from whom they were collected.

The Taxpayer wants to use the sales tax refund as a credit against its use tax rather than giving it to the distributing it to the persons who actually paid the sales tax. Refunds of sales taxes to merchants are prohibited under these circumstances.

FINDING

The Taxpayer's protest is respectfully denied.

II. Tax Administration - Ten Percent Negligence Penalty.

DISCUSSION

The Taxpayer protests the imposition of the ten percent negligence penalty pursuant to IC § 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2(b) clarifies the standard for the imposition of the negligence penalty as follows:

Negligence, on behalf of a taxpayer is defined as the failure to use such

reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The standard for waiving the negligence penalty is given at 45 IAC 15-11-2(c) as follows:

The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

The Taxpayer provided substantial documentation to indicate that its failure to pay the assessed tax was due to reasonable cause rather than negligence.

FINDING

The Taxpayer's protest to the imposition of the penalty is sustained.